



UNITED STATES PATENT AND TRADEMARK OFFICE

476

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/883,550	06/18/2001	William E. Marshall	P01936US5	1897
22885	7590	10/19/2004	EXAMINER	
MCKEE, VOORHEES & SEASE, P.L.C. 801 GRAND AVENUE SUITE 3200 DES MOINES, IA 50309-2721			ZEMAN, ROBERT A	
			ART UNIT	PAPER NUMBER
			1645	

DATE MAILED: 10/19/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/883,550

Applicant(s)

MARSHALL, WILLIAM E.

Examiner

Robert A. Zeman

Art Unit

1645

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 30 June 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,4-8 and 10-19 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1,4-8 and 10-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

The amendment and response filed on 6-30-2004 are acknowledged. Claims 1, 4 and 18 have been amended. Claims 1, 4-8 and 10-19 are pending and currently under examination.

Claim Rejections Withdrawn

The rejection of claims 1 and 17-19 under 35 U.S.C. 112, second paragraph, as being rendered vague and indefinite by the use of the phrase “sequential periods of stress” is withdrawn in light of the amendment thereto and Applicant’s arguments.

The rejection of claims 4-5 under 35 U.S.C. 112, second paragraph, as being rendered vague and indefinite by being dependent on a canceled claim is withdrawn in light of the amendment thereto.

The rejection of claims 1, 4-8 and 10-19 under 35 U.S.C. 103(a) as being unpatentable over De Vuyst et al. (Microbiology, Vol. 142, 1996, pages 817-827) is withdrawn. The cited reference does not disclose or suggest that the SRFs (bacteriocins) are “not bactericidal proteins or peptides”. It should be noted that that this rejection may be reinstated upon the resolution of the new matter rejection outlined below.

The rejection of claims 1, 4-8, 10-15 and 17-19 under 35 U.S.C. 103(a) as being unpatentable over De Vuyst et al., cited above, in view of Nanji (U.S. Patent 5,413,785 – IDS-2) is withdrawn. The cited reference does not disclose or suggest that the SRFs (bacteriocins) are “not bactericidal proteins or peptides”. It should be noted that that this rejection may be reinstated upon the resolution of the new matter rejection outlined below.

Art Unit: 1645

The rejection of claim 16 under 35 U.S.C. 103(a) as being unpatentable over De Vuyst et al., cited above, in view of Perdigon et al. (Journal of Food Protection Vol. 53, No. 5, pages 404-410, 1996 – IDS-2) is withdrawn. The cited reference does not disclose or suggest that the SRFs (bacteriocins) are “not bactericidal proteins or peptides”. It should be noted that that this rejection may be reinstated upon the resolution of the new matter rejection outlined below.

Claim Rejections Maintained and New Grounds of Rejection

35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1, 4-8 and 10-19 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The rejection of claim 1 under 35 U.S.C. 112, second paragraph, as being rendered vague and indefinite by the use of the phrase “activating and modulating” is maintained for reasons of record. It is still unclear why “activation” is not considered a type of “modulation”.

Applicant argues:

1. Activating is defined as the release of cytokines by macrophages in order to stimulate the proper immune response in an animal.

Art Unit: 1645

2. Modulating, which is distinct from activating, is defined on a cellular level as the down-regulation of macrophage receptors to prevent their over-stimulation and any resulting negative effects.

Applicant's arguments have been fully considered and deemed non-persuasive.

The specification defines the phrase “modulating an immune response” as stimulating an immune response by activating macrophages to release immune stimulating interleukins; down regulating CD-14 receptors on macrophages; down regulating CD-16 receptors on macrophages; and rescuing monocytes from apoptosis (see page 10). Hence, contrary to Applicant’s assertion, the term “modulating” is not distinct from the term “activating” but encompasses it.

35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1, 4-8 and 10-19 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. This is a new matter rejection.

Applicant has amended the claim 1 to recite the limitation “said SRFs are not bactericidal proteins or peptides”. This phrase does not appear in the specification, or original

Art Unit: 1645

claims as filed. Applicant does not point out specific basis for this limitation in the application, and none is apparent. Therefore this limitation is new matter.

Conclusion

No claim is allowed.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a).

Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert A. Zeman whose telephone number is (571) 272-0866. The examiner can normally be reached on Monday- Thursday, 7am -5:30 p.m..

Art Unit: 1645

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynette Smith can be reached on (571) 272-0864. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


LYNETTE R. F. SMITH
SUPERVISORY PATENT EXAMINER
TECHNOLOGY CENTER 1600

Robert A. Zeman
October 7, 2004